IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff	)	
	)	Cause No: 1:13-cr-00150 WTL-TAB-01
v.	)	
	)	
GUOQING CAO,	)	
	)	
Defendant	)	

GUOQING CAO'S MEMORANDUM IN SUPPORT OF HIS MOTION FOR INDEPENDENT REVIEW OF DETENTION ORDER

On the Brief:

DAVID J. HENSEL
PenceHensel LLP

ALAIN LEIBMAN (*pro hac vice*)
Fox Rothschild LLP

Defendant Guoqing Cao, by counsel and pursuant to 18 U.S.C. §3145(b), respectfully submits this memorandum in support of his previously filed motion for an independent review of the order of detention issued by the Magistrate Judge. Contrary to the specific report and recommendation of the Pretrial Services Agency and without a correct assessment of the relevant 18 U.S.C. § 3142(g) factors, the Magistrate Judge ordered that Guoqing be detained pretrial on the sole ground that he posed a risk of flight.[1]

With all due respect, the Magistrate Judge erred in analyzing the risk of flight considerations under the statute and the case law. The Court below erred in rejecting the patently reasonable recommendation of the Court's own Pretrial Services Agency, which recommended Guoqing's release on bail. As set forth below, a proper analysis of the Section 3142(g) factors compels the conclusion that the Magistrate Judge's detention order was in error and that Guoqing's future appearance at court hearings can be reasonably assured by the imposition of appropriate bail conditions.

We also present here information which could not have been made available by defense counsel to the Magistrate Judge because of the emergent nature of the detention hearing. A review of scientific papers published or sponsored by Eli Lilly, a number of which were written by Guoqing Cao as a Lilly scientist, shows that each and every "trade secret" allegedly misappropriated by him in 2011 had been published and fully disclosed to the public many years prior to the events alleged in the Superseding Indictment. This body of public information demonstrates that there were no "trade

[1] The Magistrate Judge found that the Government failed to carry its burden that Guoqing posed a danger to the community. To the same effect, the Pretrial Services report stated that there are "no known factors indicating the defendant poses a risk of danger to the community."

secrets" to be misappropriated or disclosed in 2011 and that the Government's allegations against Guoqing are fatally flawed.

We request, therefore, that the detention order be vacated, and that Guoqing Cao be admitted to bail, returned to his waiting wife and children in Carmel, and be allowed the necessary opportunity to meet with counsel to prepare his defense in this highly-technical matter and to fight as a free American citizen for his innocence and good name.

I. PRELIMINARY STATEMENT

This case presents allegations of the misappropriation of commercial data, in the form of early-stage, exploratory biological data, from a commercial entity, allegedly for the benefit of another commercial entity. For purposes of weighing the admission of Guoqing Cao to bail, this alleged offense conduct is indistinguishable from a contention that a former salesman for Acme Widget Company took confidential information about the widget-manufacturing process with him to a new employer. Substituting Eli Lilly and Company for Acme Widget, and raising the specter of China as the home office location of the alleged receiving entity, changes nothing about the proper considerations under the Bail Reform Act, 18 U.S.C. § 3142 et seq., notwithstanding any hyperbolic comments to the contrary made below by the Government.

This is ***not*** a case of economic espionage, and the Government did not charge that more serious offense, under 18 U.S.C. § 1831, presumably because there is no evidence that Guoqing took any action intending to benefit a foreign government or agency. The substantive offense charged here is the lesser offense of theft of commercial trade secrets, 18 U.S.C. § 1832. Thus, this is ***not*** a case implicating the national security interests of the United States, and there is ***not a single*** allegation of harm to the United States or of any offense committed against the security of the United States. To be sure, the defendant denies and rejects any assertion that he mishandled or misappropriated even commercial data. As demonstrated below, the defense expects to be able to prove that the material in question is and has been public-domain information and that the alleged "trade secrets" fall squarely into the domain of public information.

Given proper and sober consideration, and apart from emotional rhetoric not grounded in evidence, we submit that the Section 3142(g) factors overwhelmingly indicate that Guoqing should have been, and should now be, admitted to bail.

II. STATEMENT OF ISSUES

1. Whether the Magistrate Judge erred in ordering detention of defendant Guoqing Cao in violation of the provisions of 18 U.S.C. § 3142?

2. Whether, exercising independent review, this Court should order the defendant released on bail because he is not a risk of flight and because there are conditions which will reasonably assure the Court that the defendant will appear in court for future proceedings?

III. FACTS

A. Background – Guoqing Cao is a father, husband, long-time resident and citizen of the United States

Guoqing Cao, 49 years old, holds a PhD. Degree in Biochemistry from Ohio State University, which he achieved in 1995. He then did his post-doctoral study at the University of Texas from 1995 to 1999, in the Department of Molecular Genetics at the Southwestern Medical Center in Dallas. Among his advisors in Dallas were three

American Nobel Laureates in physiology and medicine. Guoqing has been a naturalized United States citizen since 2002. He holds no citizenship status in any other country, and when he now travels to China for his current employer, he proudly travels there, and returns to his family in Carmel, Indiana, as a citizen of his adopted country, the United States of America.

From 1999 until 2011, Guoqing worked for Lilly, where he was required by the company to travel widely, including to China. Nearly two years ago, he left Lilly to join Jiangsu Hengrui Medicine ("Hengrui"), a pharmaceutical company based in China, but with subsidiary interests here in the United States.[2] Hengrui was founded in 1998, employs more than 8,000 persons, and, according to Forbes.com, "distributes its products primarily in domestic [Chinese] markets." (available at http://www.forbes.com/companies/hengrui-medicine/) (last visited on Oct. 15, 2013). Its stock trades publicly on the Shanghai stock exchange. It has a United States subsidiary called Hengrui USA, and has subsidiaries here called Eternity Bioscience (http://www.eternitybioscience.com/), located in Cranbury, New Jersey, and eVenus Pharmaceutical (http://evenuspharma.com/), also located in Cranbury, New Jersey.

[2] The Superseding Indictment alleges that, while Guoqing Cao accepted a position with Hengrui in August 2011, he did not resign from Eli Lilly in January 2012, suggesting some sinister purpose in lingering at Lilly. The truth is otherwise, and would readily have been ascertained if the Government had not been in such haste to indict.

The defendant's wife, Mei ("Megan") Geng, has suffered health issues, identified first in an emergency hospital visit in 2010, requiring testing and follow up through mid- and late-2011. Ms. Geng's local doctor, concerned about certain test results run at that time, asked her to return in 3-6 months to have the tests re-run. Guoqing, a devoted husband and father, did not want to unsettle his family by changing jobs and committing to extended travel overseas before his wife could complete the re-run of the medical tests. Counsel proffer that they possess documents corroborating these facts; we have not attached them due to their obvious sensitivity.

Guoqing has powerful and deep ties to his adopted homeland, the United States, and to the Southern District of Indiana. He has lived in the United States for 23 years, since matriculating at Ohio State in 1990. He has been married for 23 years to Mei ("Megan") Geng, a mother and home-maker, and their oldest child, Daniel, will be graduating from Carmel High School and entering college (he hopes either Indiana or Purdue University) next fall, while their youngest, Joanna, is a 6th grader in middle school in Carmel, where they live at 12559 Pebble Knoll Way. Guoqing and his wife have owned the same home at the same location in Carmel for more than 13 years, a home which is now worth approximately $300,000. He is a past member of the board of directors of the Indianapolis Chinese Community Center, a non-profit community organization, the largest of its kind in central Indiana, which promotes Chinese language and cultural exchange activities in the state. He holds only one passport, his United States passport. *Accord* (T9:17-22) (detention hearing testimony, FBI SA Malinowski) (Chinese passport expired in 2004, no indication of renewal).

Of course, Guoqing has no criminal record, and prior to the present matter, has never been in trouble with law. His sister, Xuemei Cao, lives in Birmingham, Alabama, and was present in court at the detention hearing on October 8, 2013, prepared to post the deed to her home, such is her confidence in her brother. Of course, Megan was in court as well, ready, with deed in hand, to post the family's home in Carmel.

As the Government's investigation presumably will have revealed, Guoqing has published approximately 80 papers in more than a dozen peer-reviewed journals, putting into the public domain much of the work he has done for private employers and through academic research. He has taught as a visiting and later adjunct professor at the State University of New York, College of Medicine (SUNY Downstate Medical Center), and held that appointment through August 2013 (**Exh. A** attached).

B. Charges and arrest

Unbeknownst to him, Guoqing was named in a sealed Indictment returned on or about July 17, 2013 in the Southern District of Indiana ("Initial Indictment") (Doc. #1). There had, to that date and even until the date of arrest of October 1, 2013, been no contact with Guoqing and he had not been represented by counsel, unaware that he had need for one since he had never been in trouble. Then, coincident with securing an arrest warrant, a grand jury returned a Superseding Indictment on or about August 14, 2013 ("Superseding Indictment") (Doc. #13).

In various respects, the indictments are similar. The Superseding Indictment centered on nine (9) of what were called "Trade Secrets," numbered serially, and alleged to represent data developed at Lilly representing biological "intervention points" and "targets" for interaction with drugs hoped to be developed some day.

C. Detention hearing

Guoqing was met at his home on October 1, 2013 by agents of the FBI. He willingly admitted them into his home, having nothing to hide, and answered their questions for several hours.[3] He did not know that they arrived armed with an arrest warrant, but the agents arrested him following their interview. He did not make his initial appearance until the next day, October 2nd. His wife, Megan, was also interviewed on October 1st and willingly answered agents' questions.

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[3] We have requested that the Government provide defense counsel with a copy of any statement by Guoqing, as is the Government's primary obligation under Fed. R. Crim. P. 16(a)(1)(A) ("[u]pon a defendant's request, the government ***must*** disclose" any relevant oral statements of the defendant) (emphasis added). To this point, the Government has refused to do so unless counsel first agrees to a draconian protective order which severely limits counsel's ability to use, and conduct an investigation, based on any discovery provided thereunder. This position, we believe, is not consistent with Rule 16(d), which allows for a protective order to be entered by a court only upon a showing of "good cause," not Government fiat, and which was initially directed at protecting against the disclosure of witness identities and their exposure to harm. Rule 16(d), Advisory Committee Notes, 1944 adoption, Federal Criminal Code and

The Government moved for immediate temporary detention, which was granted, and a detention hearing was scheduled for October 8th. Magistrate Judge Dinsmore presided at the hearing. The hearing was accompanied by the Government's filing of a Motion for Pretrial Detention (Doc. #34). Detention was sought for Guoqing both because he was an alleged "serious risk of flight" and "serious danger to the community," 18 U.S.C. § 3142(f)(2)(A) and (B). The motion sounded the most dire threats to the country, asserting that this case "involve[d] the intentional misappropriation of American industry" and "the transmission of American trade secrets." (*Id.*, at 2). Only thereafter did the Government acknowledge that the case was really just about the allegation that "the defendants were stealing trade secrets and transmitting them ...for the benefit of one of Lilly's direct competitors." (*Id.*, at 2-3). In the space of a motion page, the case had devolved from a threat against the Republic to a dispute over the alleged dissemination of commercial data.

The arm of the Court charged with responsibility for investigating and reporting to the Court concerning the background, community ties, prior record (if any), and financial

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Rules, at 111 (Westlaw 2013 rev. ed.). *See also* 18 U.S.C. § 1835 (endorsing the use of protective orders for trade secret prosecutions, but only "as may be necessary and appropriate to preserve the confidentiality of trade secrets," not to provide a blanket shield for all government discovery, such as a defendant's statements, physical evidence seized from a defendant, a criminal history record or NCIC printout, etc.).

Moreover, the Government has a constitutional obligation under *Brady* to voluntarily and immediately disclose exculpatory information, even that provided by a defendant in the course of an interview conducted outside the presence of counsel, but in this case has neither provided the same nor expressed the position that no exculpatory information was elicited in an hours-long interview of Guoqing.

resources of defendants, the U.S. Pretrial Services Agency, reported to the Magistrate Judge that Guoqing scored at the lowest level for flight risk and posed no danger at all to the community or others. This could not have been the result of a hasty or improvident bail investigation, because the Government had presumably known for weeks of its intention to interview and then arrest Guoqing and so presumably had a body of investigative information to share with Pretrial Services.

The Pretrial Services report explicitly recommended his release on bail, with conditions to include surrendering his passport, reporting to Pretrial Services as required, and submitting to home detention with GPS monitoring. (**Exh. B**) (because the report is a confidential court document, it is being submitted separately under seal and is not being filed via ECF with this memorandum). It is unusual that a considered recommendation by Pretrial Services is not given great weight on bail issues, but the Court below, while giving passing mention to the Pretrial Services report, failed in its Entry and Order of Detention Pending Trial (Doc. #42) ("Detention Order") even to consider the agency's thoughtful recommendation, and disregarded the recommendation entirely in its conclusion.

The Magistrate Judge did agree with the defense that this case involved *none* of the serious offenses listed in Section 3142(f)(1) which provide for a presumption of detention, (Detention Order at 3-4), and that on these charges no rebuttable presumption of detention in favor of the Government could arise. (*Id.*, at 5). Rather, the Court held that it would only consider the Government's motion under either risk of flight or danger to the community grounds, (*id.*, at 4-5), grounds on which only the

Government bore the burden of proof. (*Id.*, at 4) (preponderance of the evidence as to "risk of flight" and clear and convincing evidence as to "danger to the community").

No matter the "risk of flight" or "danger to the community" posed by a defendant, the Magistrate Judge recognized that detention still could not be ordered unless the Court found "that no condition or combination of conditions will reasonably assure the safety of any other person or the community or will reasonably assure the appearance of the defendant as required." (*Id.*, at 5, citing 18 U.S.C. § 3142(e)).

The Magistrate Judge rejected the Government's argument that Guoqing posed a danger to any person or community. The Court in the first instance held that it was unclear by the terms of the Bail Reform Act, and in the absence of Supreme Court or Court of Appeals guidance, whether a "danger to the community" ground, even if proven convincingly, could alone support detention under Section 3142(f)(2) in the absence of persuasive flight-risk evidence. (*Id.*, at 9).

Moreover, the Government was unable to persuade the Court below that there is any support in the case law of the Southern District of Indiana or of the Seventh Circuit Court of Appeals which would attend a claim that a threat of *economic* harm, and not physical harm, would meet the "danger to the community" prong under Section 3142(f)(2)(B). (*Id.*, at 10). The Court held that "danger to the community" was not proven by the Government. (*Ibid.*).

However, the Magistrate Judge did find that the Government had proven by a preponderance that Guoqing was a risk of flight. As discussed below, the Court's factual findings tracking the Section 3142(g) elements effectively and erroneously indulged every inference in favor of the Government and ignored material evidence to the contrary. The Court below found:

First, that the Superseding Indictment "details a significant crime that involves a possible loss to the victim company in excess of $55 million," under 18 U.S.C. § 3142((g)(1) ("nature and circumstances of the offense") (Detention Order, at 6). We point out below the error of placing any reliance on this figure as a measure of harm causally related to the alleged offenses. *See infra* at 24-25.

Second, that the "weight of the evidence is strong ... alleg[ing] actual transfer of Eli Lilly and Company-owned information that would be established through tangible e-mail communications personally authored by the Defendants" under 18 U.S.C. § 3142(g)(2) (Detention Order, at 6). The Court pointedly noted that at the detention hearing Guoqing did not "offer evidence, tangible or through a proffer, that would establish significant shortcomings in the Government's evidence." (Detention Order, at 6).

Of course, it was unrealistic to expect counsel, newly appearing in this matter and with little time to prepare, to be able to effectively contest a months-long Government investigation at that initial hearing. In this motion we do identify very serious shortcomings in the Government's case, since what are alleged to have been "trade secrets" are nothing of the kind. They are exploratory data which had been reported in previously-published Lilly literature and articles. Moreover, the email of August 21, 2011, alleged in the Superseding Indictment, to have been the mechanism of disclosure, is actually a transmission of a professional resume, summarizing for a grant application highlights of those previously-published reports. *See, infra* at 19-21.

Third, evidence of "significant steps" taken by Lilly to protect trade secret information and allegations which by their terms reflect negatively on the veracity of the Defendants; "significant" evidence of "frequent travel" by Guoqing from the United States to China, which leaves the balancing of family ties in favor of detention; because Guoqing is employed by a Chinese company which allegedly benefitted from the offense, employment evidence which weighs "heavily" in favor of detention; Guoqing's access to "significant liquid assets," not specified, which weighs "heavily" in favor of detention; while Guoqing is a U.S. citizen who has lived in the Southern District of Indiana for a significant period of time, his residence in the District "is and has been tied directly to his employment with the victim company, which employment has now ended," so a length of residence which weighs in favor of detention; all 18 U.S.C. § 3142(g)(3) ("history and characteristics of the defendant) (Detention Order, at 6-8).

D. The fallacy of the "trade secrets" – all were public domain science

As Guoqing Cao's counsel proffered during the detention hearing before the Magistrate Judge, Lilly's "trade secrets" as alleged in the Superseding Indictment are in the public domain. A quick search of published scientific articles, and a Lilly patent application, clearly demonstrates that "Trade Secrets One, Two and Three" – the particular "trade secrets" that were allegedly improperly disclosed by Guoqing via an email dated August 21, 2011 (Superseding Indictment, ¶ 57) – had all been in the public domain well prior to 2011, in many instances due to published articles he wrote as a Lilly scientist, which Lilly sponsored for publication.

1. Alleged "Trade Secret One"

The Superseding Indictment describes "Trade Secret One" as "a prime target protein that reduces low-density lipoprotein cholesterol for cardiovascular disease prevention and treatment"…"the development of an antibody to this prime target protein"...and "Lilly's selection, validation and decision to pursue this target and the status of the program." (Superseding Indictment, ¶ 4).

Based upon available information, the target protein for "Trade Secret One" is likely [redacted] which is a target protein for reducing low-density lipoprotein cholesterol in cardiovascular disease prevention and treatment. There are at least 11 Lilly-sponsored and published scientific papers -- with the earliest dating back to 2006, *five years prior to the charged disclosure* -- related to [redacted], all of which are co-authored by Guoqing Cao.[4] Lilly publicly disclosed its targeting of [redacted] as early as 2007. For example, in April 2007, Lilly disclosed:

> PCSK9 deficiency augmented statin-induced increase of LDLR protein levels and thus strongly suggested the value of PCSK9 as a pharmacological target for LDL cholesterol lowering (18).[5]

In Dec. 2008, Lilly publicly disclosed:

> We review here the current understanding of PCSK9 and its potential as a therapeutic target through which to reduce LDL cholesterol for prevention and treatment of coronary heart disease.[6]

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[4] All of the published papers cited in this brief are available through PubMed, an online library and search engine maintained by the National Institutes of Health (http://www.ncbi.nlm.nih.gov/pubmed/).

[5] Qian et al., *J Lipid Res.*, 48(7):1488, 1489 (2007) (emphasis added).

In the interests of space, we have not appended to this brief the numerous published articles excerpted in the text. We presume that the Government has reviewed these materials in the course of their investigation but, if not, we would be happy to provide copies. Similarly, if the Court wishes to review any of the referenced articles, we would be pleased to forward copies of the same.

Moreover, Lilly publicly disclosed its efforts in developing antibodies for [redacted] as early as 2009:

> This concept that PCSK9 acts as a secreted protein to bind the hepatic LDLR and causes its degradation is supported by recent findings that disruption of this binding using anti-PCSK9 antibody results in preserved LDLR and decreased LDL-C (15–17)."[7]

Lilly made additional public disclosures about its interest in [redacted] antibodies in February 2011:

> These observations clearly established a proof-of-concept that a neutralizing anti-PCSK9 monoclonal antibody is capable of reducing LDL-C levels in primates."[8]

Again in 2011, Lilly made a further public disclosure:

> Unraveling the role of proprotein convertase subtilisin kexin type 9 (PCSK9) as a key posttranscriptional regulator of the LDL receptor (LDLR) has shed light on its attractiveness as a target for LDL cholesterol (LDL-C) lowering. . . . Subsequently, the development of novel monoclonal PCSK9 antibodies facilitated sensitive and robust ligand-binding assays that have produced concrete conclusions linking PCSK9 to LDL-C regulation.[9]

Thus, Lilly's selection, validation, and decision to pursue the [redacted] target, the development of [redacted] antibodies, and the status of the [redacted] program were disclosed by Lilly as early as 2006 and were firmly in the public domain, and thus, as a matter of law, cannot have been "trade secrets" in 2011.

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[6] Cao G. et al., *Endocr Metab Immune Disord Drug Targets*, 8(4):238, Abstract (2008) (emphasis added).

[7] Troutt et al., *J Lipid Res.*, 51(2):345, Abstract, 345 (2010) (emphasis added).

[8] Konrad et al., *Lipids Health Dis.*, 10:38, Abstract, 1, 6 (2011) (emphasis added).

[9] Pottanat et al., *Current Topics in Biochemical Research*, 13(2):1, Abstract (2011) (emphasis added).

2. Alleged "Trade Secret Two"

"Trade Secret Two" is described as "the development of a small molecule Inhibitor, explored as a 'target of interest' for managing dietary fat absorption and resulting in a new approach to the treatment of diabetes, dyslipidemia, and obesity"... "Lilly's expansive research and development involved in the pursuit of the 'target of interest' culminated in a selection of a compound for human clinical trials in or around July 2011" and "Lilly's selection, validation and decision to pursue this target and the status of the program." (Superseding Indictment, ¶ 6).

Based upon available information, the target receptor in "Trade Secret Two" is likely [redacted], a target protein for managing dietary fat absorption in treating diabetes, dyslipidemia, and obesity. But there are at least 6 Lilly-sponsored scientific papers on [redacted], one of which is co-authored by Guoqing Cao, and the earliest Lilly [redacted] paper was published as far back as 2003.

As early as February 2003, Lilly publicly disclosed its interest in [redacted] as a target for obesity:

> Our current study on MGAT2 has provided basic information for future work on the potential physiological and pathological roles of MGAT2 in dietary fat absorption and thus may present MGAT2 as an attractive drug target for obesity intervention.[10]

In May 2003, Lilly made similar public disclosures about [redacted] and obesity:

> Acyl-CoA:monoacylglycerol acyltransferase (MGAT) plays an important role in dietary fat absorption by catalyzing a rate-limiting step in the re-synthesis of diacylglycerols in enterocytes. . . . The

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[10] Cao J. et al., *J Biol Chem.*, 278(16):13860, 13865 (2003) (emphasis added).

> elucidation of properties of MGAT2 will facilitate future development of compounds that inhibit dietary fat absorption as a means to treat obesity.[11]

In June 2003, Lilly publicly disclosed its interest in [redacted] and diabetes:

> Additionally, MGAT activity was known to be regulated by starvation, hibernation, and disease states such as diabetes (8, 19, 20).
>
> . . .
>
> The cloning and characterization of the human MGAT2 gene have made it possible to test the hypothesis that development of hMGAT2 inhibitors could be used as an alternative means in treating or even preventing human obesity.[12]

Finally, in February 2004, Lilly publicly disclosed its interest in [redacted] related to abnormal lipid metabolism:

> Thus, although both enzymes are involved in the re-synthesis of triacylglycerol, MGAT and DGAT may differ significantly in their physiological roles, suggesting that MGAT2 may present a better target for intervening dietary fat absorption as a means to treat obesity.
>
> . . .
>
> Abnormal lipid metabolism resulting in increased levels of chylomicrons and very low density lipoproteins and hypertriglyceridemia is one of the common features associated with diabetes and obesity. In addition, abnormal MGAT activity has been observed in some rodent models of diabetes.[13]

Thus, Lilly's selection, validation, and decision to pursue the [redacted] target in connection with diabetes, dyslipidemia, and obesity, and the status of the [redacted] program, were publicly disclosed by Lilly as early as 2003 and constituted information available to the general public well prior to the date of the allegedly furtive email transmission and related activity in 2011.

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[11] Cao J. et al., *J Biol Chem.*, 278(28):25657, Abstract (2003) (emphasis added).

[12] Lockwood et al., *Am J Physiol Endocrinol Metab.*, 285(5):E927, E936(2003) (emphasis added).

[13] Cao J. et al., *J Biol Chem.*, 279(18):18878, 18885 (2004) (emphasis added).

3. Alleged "Trade Secret Three"

The Superseding Indictment describes "Trade Secret Three" as "a member of the nuclear receptor family of transcription factors, as a 'target of interest,' explored for the treatment of dyslipidemia (abnormal cholesterol levels in the blood)"... "after six years of dedicated research and development, Lilly scientists discovered toxicity and its research was discontinued"..."however, [the toxicity discovery] propelled Lilly's research forward and streamlined the company's efforts to identify drugs that would be used to prevent and treat dyslipidemia, an important marker for metabolic syndrome" and "Lilly's selection, validation and decision to pursue this target, the status of the program, as well as the reason for its discontinuation." (Superseding Indictment, ¶ 7).

Based upon available information, the target of interest in "Trade Secret Three" is likely [redacted], a member of the nuclear receptor family of transcription factors and related to the treatment of dyslipidemia. There are, however, at least 20 Lilly-sponsored scientific papers on [redacted], 14 of which are co-authored by Guoqing Cao, and the earliest of these was published in 2002, *nine years prior to the alleged disclosure by Guoqing of a supposedly closely guarded Lilly secret.*

In Aug. 2002, Lilly publicly disclosed:

> Liver X receptors (LXR) belong to the nuclear receptor superfamily that can regulate important lipid metabolic pathways. . . . We report here that a specific LXR agonist, T0901317, elevated HDL cholesterol and phospholipid in C57/BL6

mice and generated enlarged HDL particles that were enriched in cholesterol, ApoAI, ApoE, and phospholipid.[14]

In 2003, Lilly publicly disclosed its interest in [redacted] as novel targets for diabetes:

> The oxysterol receptors LXR (liver X receptor)-α and LXR are nuclear receptors that play a key role in regulation of cholesterol and fatty acid metabolism. We found that LXRs also play a significant role in glucose metabolism. Treatment of diabetic rodents with the LXR agonist, T0901317, resulted in dramatic reduction of plasma glucose. . . . These data not only suggest that LXRs are novel targets for diabetes but also reveal an unanticipated role for these receptors, further linking lipid and glucose metabolism.[15]

Further, in February 2004, Lilly publicly disclosed:

> A pair of nuclear receptors named liver X receptors (LXRα and LXRβ) are instrumental in regulating reverse cholesterol transport (Repa and Mangelsdorf, 2002). . . . Thus, LXRs have emerged as prime targets through which to modulate cholesterol catabolism for metabolic diseases and atherosclerosis.[16]

Guoqing Cao was even named as a co-inventor of a Lilly-filed patent application on [redacted], which was published on April 17, 2003 and which publicly disclosed that:

> The current invention relates to the fields of medicinal organic chemistry, pharmacology, and medicine. Further, the current invention relates to a group of compounds that demonstrate utility for treating pathological states of dislipidemia and/or atherosclerosis through modulation of liver X receptor(s).[17]

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[14] Cao G. et al., *J Biol Chem.*, 277(42):39561, Abstract (2002) (emphasis added).

[15] Cao G. et al., *J Biol Chem.*, 278(2):1131, Abstract (2003) (emphasis added).

[16] Beyer et al., *J Pharmacol Exp Ther.*, 309(3):861, 861–62 (2004) (emphasis added).

[17] WO 03/031408, at 1 (emphasis added).

If the toxicity of the [redacted] agonists was considered the "secret" aspect of "Trade Secret Three," then there is no basis for a chargeable disclosure there, either; Lilly itself disclosed publicly on several occasions, years prior to the charged email disclosure, that [redacted] agonists can induce hypertriglyceridemia and liver steatosis.

In Oct. 2002, Lilly publicly disclosed:

> Although LXRs have been regarded as potential targets for mediating cardiovascular benefits, the induction of hypertriglyceridemia and liver steatosis has severely hampered its development.[18]

In Aug. 2005, Lilly publicly disclosed:

> Thus, LXR agonists may induce peroxisomal β-oxidation as a counterregulatory response to the hypertriglyceridemia and liver steatosis that are also promoted by potent LXR agonists in vivo.[19]

Further, the toxicity of [redacted] agonists, including [redacted], was reported in other public literature in 2010:

> Specifically, T0901317 had been used extensively for its LXR agonist activity in human clinical trials for treatment of dyslipidemia. While in general the drug was well tolerated, it was withdrawn from further testing due to the observation of increased triglycerides in patients.[20]

Again, Lilly's selection, validation, and decision to pursue the [redacted] target, the status of the [redacted] program, and the reason for the discontinuation in testing due to toxicity, were fully and publicly disclosed by Lilly as early as 2002 and thus cannot have been a chargeable "trade secret" in 2011.

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[18] Cao G. et al., *J Biol Chem.*, 278(2):1131, 1135–36 (2003) (emphasis added).

[19] Hu et al., *Endocrinology*, 46(12):5380, 5381 (2005) (Exhibit 23) (emphasis added).

[20] Kumar, et al., Identification of a Novel Selective Inverse Agonist Probe and Analogs for the Retinoic Acid Receptor-related Orphan Receptor Alpha (RORa), *Probe Reports from the NIH Molecular Libraries Program [Internet], Bethesda (MD), National Center for Biotechnology Information (US) (2010), available at* http://www.ncbi.nlm.nih.gov/books/NBK143192/ (last updated Mar. 14, 2003) (emphasis added).

E. **The fallacy of the August 21st email – it was resume information**

The Superseding Indictment alleges that on August 21, 2011 Guoqing Cao "misappropriated Lilly Trade Secrets One through Three by sending an e-mail containing Trade Secrets One through Three to Individual #1." (Superseding Indictment ¶ 57). However, it is obvious from the content of the email (**Exh. C**)[21] and its attachment that Guoqing Cao did not misappropriate any alleged trade secrets.

In his email, Guoqing forwarded an attachment containing his biographical information to be included in a grant application that his new employer, Hengrui, was preparing to file. (While he was still employed by Lilly at the time, disaffection from one's current employer is not a federal offense). The substance of the attachment related to "Trade Secrets One, Two and Three" is as follows:

> i. ***Dr. Cao has led the effort in developing an antibody against [redacted], a prime target that reduces low-density lipoprotein cholesterol for cardiovascular disease prevention and treatment. He has also led the effort in developing a small molecule inhibitor of [redacted] that is a first-in-class molecule in the pharmaceutical industry. Dr. Cao represents of the best discovery scientists and a leader in pharmaceutical industry. Besides his expertise in diabetes, diabetic complication (nephrophathy and retinopathy), obesity and cardiovascular disease***, Dr. Cao has broad interest and knowledge in multiple disease areas including Alzheimer's disease, cancer and inflammation. He is

[21] The Government has asked that we not attach the email in question as an exhibit to the ECF-filed version of this memorandum. We vigorously dispute for the reasons contained herein that the email contains any "trade secrets" but have acquiesced to the Government's request simply to avoid unnecessary motion practice before the Court on this issue at this time. Due to the same request, and under the same objection, we likewise have redacted the ECF-filed version of this memorandum to excise specific references characterized by the Government as secret.

an internationally recognized expert in lipid metabolism and serves actively in the scientific community and the pharmaceutical industry.

ii. Programs:

1. [redacted] inhibitor 2003-2006, Lilly Research Laboratories. Project leader. Responsible for developing lead generation strategy, developing project flow scheme, key assays and animal models. Leadership in lead optimization and candidate selection. Further guidance and development of strategy for clinical studies. [redacted]

2. ***[redacted] antibody 2006-2010, Lilly Research Laboratories, Lead Biologist. Responsible for developing project strategy, key assays and models. [redacted]***

3. ***[redacted] inhibitor 2008-2011, Lilly Research Laboratories. Project leader. [redacted]. Patent filing is in process.***

4. ***1999-2006. [redacted] modulator. Project leader. Led the effort in developing lead generation strategies and developed [redacted].***

iii. Major achievements: since joining Eli Lilly & Company, Dr. Cao has led the efforts in multiple drug discovery programs. His leadership and efforts led to more than 15 screenings and more than 30 discovery milestones. These efforts culminated in discovery of several clinical

> candidates, among which, evacetrapib represents one of the most exciting programs in the whole company. ***Discovery of*** [redacted] ***inhibitors as clinical candidates marks the first-in-class opportunity for the company in the entire pharmaceutical industry.*** Dr. Cao has contributed 4 patents and two trade secrets for the company. Dr. Cao is also a well-recognized lipid expert in scientific community and has published more than 70 papers in top peer-reviewed journals. The detailed patent and publication information is attached.

The disclosure is nothing more than a resume listing publicly-disclosed work performed for Lilly and, by that date, well ensconced in the public domain. Thus, everything related to "Trade Secrets One, Two and Three" in the biographical information provided by Guoqing to Individual #1 on August 21, 2011 had been published in Lilly-sponsored papers and was public information. Indeed, as demonstrated above, the publicly available information about "Trade Secrets One, Two and Three" was much more detailed and substantive than anything included in this email.

Despite this enormous amount of published scientific literature showing that none of the "secrets" alleged to have been disclosed by Guoqing were actually secret at all, none of this exculpatory information was presented below. We ask this Court to now consider the true "strength" of the Government's case; its actual and fundamental weakness augurs strongly in favor of bail. Moreover, a searching examination of the other Section 3142 factors, together with a consideration of the bail decisions in other cases involving more serious charges and defendants with fewer ties to their communities, all support the grant of bail here.

Guoqing Cao is a well-published and respected scientist, and a responsible U.S. citizen with a long history in this District and an even longer history in this country. He should be permitted bail in order to defend himself in a case where his assistance and ready availability to his attorneys in a technical, scientific case will be essential.

III. LEGAL ARGUMENT

The Bail Reform Act of 1984 "carefully limits the circumstances under which detention may be sought to the most serious crimes." *United States v. Salerno*, 41 U.S. 739, 747 (1987), and is not intended to constitute pre-conviction punishment. *Ibid.* The Act's presumption, except in case of offenses not charged here, is heavily in favor of release on bail. "Only in rare circumstances should release be denied, and doubts regarding the propriety of release should be resolved in favor of release." *United States v. Hammond,* 204 F. Supp.2d 1157, 1161 (E.D. Wisc. 2002) (quoting *United States v. Chen*, 820 F. Supp. 1205, 1207 (N.D. Cal. 1992)).

Release may be denied only when there are no conditions that will "reasonably assure" the appearance of the defendant and the safety of the community. 18 U.S.C. § 3142(e). "Section 3142 does not seek iron-clad guarantees, and the requirement that the conditions of release 'reasonably assure' a defendant's appearance cannot be read to require guarantees against flight." *Hammond,* 204 F. Supp.2d 1157, 1161 (citing *Portes* 786 F.2d. at 764 n. 7). The mere possibility of flight is not enough to justify detention. *United States v. Huang*, Cause No. 1:10-cr-102 (WTL-KPF) (Entry on Motion for Revocation of Detention (Doc. #49) (Nov. 8, 2010), at 3 (citations omitted)).

These principles do not merely invoke the words of the statute; they embody the central proposition of the Bail Reform Act, which "***requires*** the judge to consider the possibility of less restrictive alternatives to detention ...." *United States v. Infelise,* 934 F.2d 103, 105 (7th Cir. 1991) (emphasis added; citation omitted).

In reviewing the determination of the Magistrate Judge, this Court does not defer to the lower court's decision. *United States v. Cervantes,* 951 F.2d 859, 861 (7th Cir. 1992) (citing *United States v. Portes,* 786 F.2d 758, 763 (7th Cir. 1985)). Rather, it conducts an "independent review" of the entire record to determine if the detention decision was correct, *Portes,* 786 F.2d at 762. This "*de novo* review of the magistrate judge's release or detention order need not defer to the magistrate's findings." *United States v. Whorton,* 2013 WL 1438218 *1 (S.D. Ind., Apr. 9, 2013) (Lawrence, J.) (citation omitted).

A. The assessment by the Court below of the Section 3142(g) factors was highly flawed and should be rejected in this Court's independent review

The Magistrate Judge reached an incorrect conclusion as to each pertinent factor of Section 3142(g). The Government's evidence as to each factor was questionable and the Court's reliance upon it unwarranted, and the Government's arguments which were accepted by the Court too readily should instead have been rejected.

(1) Nature and Circumstances of Offense—(g)(1)

This factor asks whether the offense is a crime of violence, a violation of Section 1591 of Title 18, a federal terrorism crime, or involves a minor victim or controlled substance, firearm, explosive, or destructive device. In short, this factor largely tracks the enumerated offenses in Section 3142(f)(1), and is wholly inapplicable to the charges brought here. *See United States v. Parahams,* 2013 WL 683494 *4 (N.D. Ind., Feb. 25, 2013).

Even if the Section (g)(1) factor has a place in the bail assessment here, the Magistrate Judge's findings erroneously accepted without question the speculative and uncorroborated claim of a $55 million loss to Lilly (*Order*, at 6). This finding was entirely based on the self-serving testimony of a Lilly product development officer at the hearing who put a figure of $55 million on the "possible" loss to the company as a result of the alleged offenses. (*Id.*, at 2, 6).

But this figure is entirely implausible even against the words of the Superseding Indictment, which make reference to only the most preliminary and uncertain Eli Lilly data, far closer in chronological development to common early-stage failures than to marketing success. Endless obstacles of laboratory testing, government approvals, clinical trials, competitive drugs and alternative treatments and the like stand between the most promising idea and value in the consumer marketplace – it is near-absurd to assign any dollar value to Lilly's fragmentary and inchoate data points,[22] even if they qualified as "trade secret" and were not already in the public domain.

The contention is even more fanciful when the actual detention hearing testimony is examined closely. The $55 million was not put forth by a Lilly officer as a cognizable lost sales or profits figure, but simply as a tally of research and development costs which had been expended collectively on work involving the "Trade Secrets." (T45:17-21) (detention hearing testimony, William Heath). But that is a sunk cost, which was

[22] Perhaps even the Magistrate Judge might have questioned the credibility of this Lilly witness if the Court had known that while it was hearing the Lilly testimony, the company's General Manager had approved a press release which differently characterized this data and undermined the credibility of that testimony. The press release issued by the company's General Counsel following the detention hearing provided in part:

> The confidential information these former employees are accused of stealing ***relates to early stage clinical development of potential new medicines***. While very serious, ***the theft does not significantly jeopardize our overall research and development pipeline.***

(available at http://www.insideindianabusiness.com/newsitem.asp?ID=61754) (last visited Oct. 15, 2013) (emphasis added). This candid statement by the "victim" of the offense undermines any claim by the Government of significant loss.

incurred and which would have been incurred, "trade secret" theft or not. It has no logical connection to the type of "loss" with which we are familiar under the Sentencing Guidelines, since there is no causative connection between the earlier-incurred costs and the later-occurring alleged theft. Nor do these research and development costs place any value on related data if that data yields no real world, marketplace value, because drugs are never developed, research is abandoned, or the research path turns out to be flawed.

If an oil company spends $55 million drilling for oil in a secret location, and a former employee discloses that location to another company, but the drilled hole turns out not to produce any measurable amount of marketable oil, then the disclosure cannot in reason or criminal law be said to have cost the first company $55 million as a result of the disclosure. Nor has Lilly suffered a $55 million loss here attributable to anything done by Guoqing Cao.

(2) Weight of the evidence—(g)(2)

It has been said that the "weight of the evidence" consideration is the least important factor, for the obvious reason that the statute neither requires nor permits a pretrial determination of guilt. *United States v. Gebro*, 948 F.2d 1118, 1121 (9th Cir. 1991). A detention hearing arranged on a few days' notice cannot be a forum for a full-throated test of the strength of the Government's allegations, and months of investigation cannot be controverted by mere hours of preparation. So, the Magistrate Judge's finding that defense counsel somehow failed to "establish significant shortcomings" in those allegations cannot seriously be supported; this is, after all, not a bank robbery case where defense counsel can prepare and present an alibi defense hours after arrest.

Yet, the Magistrate Judge leaned heavily on the purported strength of evidence factor, finding that the weight was "strong" because the Superseding Indictment alleged the existence of "tangible e-mail communications" authored by Guoqing. However, during the hearing, Guoqing maintained that the information at issue was all in the public domain and that he had published dozens of articles related to his work at Eli Lilly.

An assessment of the "strength" of the Government's evidence and of its allegations which does not blindly accept them reveals, to the contrary, that the evidence is flimsy and an untrustworthy basis on which to deny bail. To begin with, a "trade secret" under 18 U.S.C. § 1839(3) must obviously be "secret," must be one of the enumerated types of data of which "the owner thereof has taken reasonable measures to keep such information secret" and is the type of information which derives economic value from not being generally known to or ascertainable by the public.

Guoqing is charged with theft of Trade Secrets One, Two, and Three (Counts 1-3), all of which were supposedly contained in a single email sent by him on August 21, 2011 to another individual, purportedly to be used in a disclosed grant application (Initial Indictment, ¶ 57). Another defendant, not Guoqing, is alleged to have transmitted Trade Secrets Four, Five, Six, Seven, Eight, and Nine (*Id.*, at ¶¶ 72-74). Here the indictments diverge -- Guoqing was initially also substantively charged with theft of Trade Secrets Four, Five, Six, Seven, Eight, and Nine (Initial Indictment, Count 5-10), but is now not charged with theft of Trade Secrets Four, Five, or Six, and only with theft of numbers Seven, Eight, and Nine (Superseding Indictment, Counts 5-7). The Government or Eli Lilly, it appears, may have on reflection taken a more narrow view of what even may be considered by them to have been a trade secret.

And a reconsidered view is entirely proper here, because as shown above a quick review of published scientific technical literature shows that these "trade secrets" were actually public domain information. For example, focusing for present purposes only the three "Trade Secrets" with Guoqing is alleged to have transmitted himself, a review of the published literature shows that *none of the three* could have been considered a "secret" of any kind at the time of the alleged transmission. It comes as no surprise, then, that the Government was not able to advise the Magistrate Judge that the present employer of Guoqing is even making any use of this allegedly highly-valuable and important "trade secret" information. (T21:10-13) (detention hearing testimony of FBI SA Malinowski) – the data is years-old and well known to the entire industry.

If, as the Magistrate Judge believed, "strength" of evidence is to be considered, then that is a factor which weighs heavily *against* the Government, and in favor of bail for Guoqing.

(3) History and characteristics of Guoqing Cao—(g)(3)

Here, the Magistrate Judge made numerous errors, both in apprehending the pertinent facts and in applying them to this bail factor:

- Character. The Magistrate Judge determined that Guoqing's character was a negative factor on the ground that, according to the Superseding Indictment, he had breached Lilly's trust by disclosing trade secrets. This reasoning is of course circular --

no defendant could ever satisfy the character test because, by definition, all defendants are charged with crimes. The proper analysis involves an assessment of the defendant's character *prior* to the instant charges. On that score, the government offered absolutely no evidence regarding Guoqing's character. Moreover, at the hearing, Guoqing proffered that he had an excellent reputation as a scientist and that many witnesses, including current and former Lilly employees, would testify at trial about his good character. The Government offered no evidence in rebuttal. The Magistrate clearly erred by denigrating Guoqing's character merely through the presentation of allegations, which the defendant vehemently denies. It doubled down on this error by assigning "heavy" weight to this erroneous finding. To the contrary, Guoqing's sterling character, lived through his 49 years, weighs in favor of release.

- Family ties. Guoqing has been married to Megan for over 23 years and they have two children, ages 17 and 11, who have lived nearly their whole lives in the same home in Carmel, Indiana. Guoqing, his wife, and their two children are all U.S. citizens. Guoqing's sister, Xuemei Cao, resides in Alabama and was present at the hearing.

While it is true that Guoqing has frequently traveled overseas, including trips to China, given his profession and the requirement of is employers, it is not surprising that he has made such trips. Guoqing has always returned to his home, the United States, to be with his family. .

Megan Geng explained to her FBI interrogators that her father in China is very ill (he has Parkinson's disease) and that she (not Guoqing) planned to stay for a time with her father in China, but the Court's findings rendered that expression of her familial love as a matter of "great concern" to the Court, even though her husband the defendant was not identified as having any interest in staying in China (*id.*, at 7), and even though Ms. Geng and Guoqing have no intention of selling their Carmel home, where their children have grown up and where their children are in school. The testifying FBI agent conceded that Ms. Geng did not when voluntarily interviewed by the FBI speak of any kind of permanent relocation outside the United States. (T28:12-16) (detention hearing testimony of FBI SA Malinowski).

The findings of the Court below also appeared to misunderstand Government Ex. 1 offered at the detention hearing, which related to foreign travel since 2001 by Guoqing. Certainly, the Exhibit is confusing, as it jumbles dates and lists several partial-leg trips only, e.g., listing an "Outbound" flight with no corresponding return flight. The Magistrate Judge characterized this list of dates and trips as demonstrating "frequent travel ... to and from the United States to China and several other countries." (*Id.*, at 7). Conceding that "some of the travel in question was related to Defendants' employment by the victim company [Lilly]," the Court observed that there was no evidence of the reasons for the additional travel, making the Government's list "significant" flight-risk evidence. (*Ibid.*)

With all due respect, this analysis completely misunderstands the significance of the list of dates and trips. For one thing, when "Outbound" travel is matched with corresponding "Inbound" travel, and outliers (like a single listing for a 3/29/01 "Inbound" from "Unknown" location with no identified "Outbound" date) are put aside, the list reduces to approximately 18 trips out of the United States of all kinds, personal and business, since 2001.[23] *Of those 18, fully 13 of all trips were undertaken while Guoqing worked for Lilly.*

Even the FBI agent who testified at the detention hearing acknowledged that, while Guoqing was employed with Eli Lilly, his family remained in Carmel while Guoqing traveled to China in order "to fulfill his employment obligations [to Lilly]." (T13:13-18) (detention hearing testimony, FBI SA Malinowski). It is most peculiar and unfair for the Government to concede that the vast majority of these foreign trips were mandated by Lilly, but then to turn around and use those same Lilly-required trips over many years as flight propensity evidence in 2013. It is regrettable that the Magistrate Judge accepted that reasoning without question.

Some other factual findings were, simply and respectfully, puzzling. Guoqing left Lilly's employ two years ago, and now works for a concern based in Shanghai, China. Required to spend lengths of time in China for work, he still comes home to Carmel, where he and Megan continue to own their home and will continue to own it for the foreseeable future. Yet, the Magistrate Judge somehow concluded that "the defendant's residence in this district is and has been directly tied to his employment with the victim company [Lilly], which employment has now ended." (*Id.*, at 8). Yes, that employment ended; no, residence in this District did not end with it.

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[23] (i) 9/26/03-10/17/13 (sic): Tokyo; (ii) 9/1/04-9/6/04: Athens; (iii) 10/23/04-10/28/04: Venice; (iv) 7/2/07-7/6/07: Miami ; (v) 10/8/07-10/12/07: Athens; (vi) 9/22/08-9/26/08: London; (vii) 5/15/09-5/28/09: China; (viii) 10/20/09-11/1/09: China; (ix) 5/27/10-6/10/10: China; (x) 11/2/10-11/14/11 (sic): China; (xi) 5/30/11-6/10/11: China; (xii) 7/2/11-?: Niagara Falls; (xiii) 9/22/11-9/28/11: Hong Kong; (xiv) 3/29/12-4/9/12: China; (xv) 6/4/12-6/12/12: Detroit, San Francisco, New York, China; (xvi) 9/21/12-10/17/12: China; (xvii) 12/20/12-1/9/13: China; and (xviii) 2/6/13-3/8/13: China.

- Employment. It is true that Guoqing is currently employed by Hengrui, which is based in China, although it has several United States subsidiaries and offices in New Jersey. However, any concerns about his communications with Hengrui could easily be addressed by Guoqing's offer during the hearing to have absolutely no contact with his current employer during the pendency of this matter.

- Financial resources. It is wholly unclear what the Court below meant by finding that Guoqing has "significant liquid assets." But for Guoqing's Carmel, Indiana home, the Government offered no evidence regarding Guoqing's financial resources. His annual income, reported in the Pretrial Services report, is significant but likely not much more than is earned by the prosecutor handling this matter. The Government did not offer any evidence, despite lengthy investigation, of properties owned in other states, much less in other countries, or large-balance bank accounts or any of the usual indicia of "significant liquid assets." Any concern that the Court may have about Guoqing's ability to sell his house in order to flee can be easily addressed by Guoqing's offer during the hearing to post his home as security for his future appearance in court. Because the Government bears the burden, its failure to produce evidence weighs in favor of release.

- Length of Residence. Guoqing has been a resident of the United States for over 23 years and a citizen since 2002. As noted above, he and his wife and children have all lived in the same Carmel, Indiana home for the last 13 years. While it is true that for the last year and a half Guoqing has been required by work to spend extensive time in China, Guoqing has always returned to the United States to be with his family. The Magistrate Judge inexplicably found this to be evidence for the absolute, and incorrect statement, that "Cao resides in China" (*Id.*, at 8). Guoqing continues to regard Indiana as his home and residence.

- Past criminal conduct; history relating to drug and alcohol abuse; criminal history; record concerning appearance at court appearances; status of pretrial release and probation at the time of offense. The Magistrate Judge correctly noted that Guoqing has no past criminal record and the Government offered no evidence relating to drug or alcohol abuse. Given no prior record, there could have been no evidence presented concerning Guoqing's failure to appear at previous court appearances. Because the burden of detention rests upon the Government, this factor clearly weighs in favor of release.

In sum, a review of the Section 3142(g) factors must conclude with an assessment that Guoqing Cao has not been proven by the Government to be a risk of flight.

B. A review of other cases applying Section 3142(g) criteria indicates that bail should be granted here

A number of other courts considering technology-transfer allegations have granted bail in like, or more severe, circumstances than are presented by the Government in support of detention here. For example, in *United States v. Yaming Nina Qi Hanson,* 613 F. Supp.2d 85 (D.D.C. 2009), the defendant and her husband were charged with illegally exporting military components to China, in the form of unmanned aerial vehicle (UAV) autopilot parts. Because these UAVs could be armed, the United States requires that their export be controlled for national security reasons through licensing, a requirement which Hanson and her husband evaded by smuggling the parts out of the United States. *Id.*, at 87.

The defendant was a naturalized U.S. citizen, but had what the magistrate judge found, and the District Court agreed, were "significant" ties to China: she was unemployed in the U.S.; on a recent passport renewal, she had indicated that she and her husband intended to go to China for an extended period of time; Hanson had an ex-husband and children in China; her present marriage was heading to divorce; she owned two properties in China and had "close business connections there" with family and friends; she had multiple passports from the U.S. and from China; and she traveled abroad extensively, having spent only 23 days in the United States during 2008. *Id.,* at 88-89. Hanson also faced, if convicted, a long prison sentence of 63-78 months under the advisory Sentencing Guidelines. *Id.,* at 87. On the other hand, Hanson had lived in the United States since 1989; owned a home in California; and was a naturalized citizen. *Id.*, at 89.

The magistrate judge ordered Hanson detained on flight-risk grounds, but the District Court ordered her released on bail. The court first noted that the Bail Reform Act "embraces a strong presumption *against* detention. 'In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.'" *Id.*, at 87 (quoting *United States v. Salerno,* 481 U.S. at 755) (internal quotation omitted). Keeping that standard in mind, and despite the alleged injury to the United States' national security interests caused by the defendant's actions, the District Court ordered Hanson released on condition of home confinement with monitoring, together with travel restrictions, because those were conditions which would reasonably assure her appearance in court. *Id.*, at 90-91.

Detention of Guoqing, who comparatively has much stronger ties to the United States than the defendant in *Hanson* and weaker connections to China than she did, cannot be reconciled with the analysis in *Hanson*, which was not a case involving alleged theft of commercial data from a commercial entity, but of weapons technology smuggled from the United States.

Every bail decision should turn on the specific facts of the case and the particular characteristics of the individual defendant. But it may be instructive to note that in numerous other cases involving alleged technology transfers to Chinese concerns, and with Chinese-American defendants sometimes facing more severe charges and/or lacking the same strength of local ties enjoyed by Guoqing, courts have readily granted those defendants bail. From a review of the docket sheet in the following cases, it is not even apparent that the government opposed the defendants' release on bail, in contrast to the severe position taken in this case, which suggest that the prosecution's position before this Court is extreme and out of sync with Department of Justice positions taken in other cases. Illustrative matters include the following:

(i) United States v. Yu Qin, Case No. 2:10-cr-20454 (E.D. Mich.) – defendant charged under 18 U.S.C. § 1832 with theft of General Motors' trade secrets concerning hybrid electric vehicles, pursuant to a plan to sell the technology through a joint venture in China, and alleged to have emailed those trade secrets to a GM competitor in China, Chery Automobile; also charged with wire fraud and obstruction of justice (Indictment, 7/22/2010, Doc. #3). Qin released on a $10,000 unsecured bond, no home confinement or monitoring, no restriction on internet or email usage, and no restrictions on communication with non-parties (Order Setting Conditions of Release, 7/22/2010, Doc. #9) (referenced filings attached as **Exh. D**);

(ii) United States v. Dongfan Chun, Case No. 8:08-cr-0024 (C.D. Cal.) – defendant charged under the more serious offense of economic espionage, 18 U.S.C. § 1831, and with obstruction of justice, for providing secret and classified Boeing rocket and military aircraft technology to agents of the government of China (Indictment, 2/6/08, Doc. #1). Although no bail order as such appears on the docket, an entry for the defendant's initial appearance shows that he was admitted to bail on the execution of an appearance bond secured by sureties including the deeding of a property (Docket sheet, entry #9) (referenced filings attached as **Exh. E**);

(iii) United States v. Hanjuan Jin, Case No. 1:08-cr-00192 (N.D. Ill.) – defendant charged with violations of both 18 U.S.C. §§ 1831, 1832 for theft of data from a telecommunications company in Chicago which were transferred by her to her new employer, a Chinese company with ties to the Chinese military, and which was found on her person as she attempted to fly from the United States to China on a one-way ticket (Superseding Indictment, 12/9/08, Doc. #37). The order setting conditions of release upon the initial appearance is not accessible on PACER, but the docket sheet reflects that the defendant was released on bail on 3/7/08 on a $50,000 bond secured by property (Docket sheet, entries #6-7) (referenced filings attached as **Exh. F)**;

(iv) United States v. Yudong Zhu, Case No. 1:13-cr-00761 (S.D.N.Y.) – defendant, employed at an American university, charged with mail and wire fraud, bribery, and falsification of records, for misappropriating research and non-public information relating to MRI technology and transferring the same to a Chinese company in exchange for millions of dollars in cash and stock (Indictment, 10/2/13, Doc. #20). No bail order as such appears on the docket, but the docket sheet does reflect that on an initial appearance on 5/20/13 the defendant was released on bail in the form of a bond secured by property (Docket sheet, entries #4-5) ((referenced filings attached as **Exh. G**).

A useful contrast may also be drawn with a recent case before this Court. In the matter of *United States v. Kexue Huang,* Cause No. 1:10-cr-0102 (WTL-KPF), the defendant was charged with economic espionage, 18 U.S.C. § 1831, for allegedly transmitting certain secrets of Dow AgroScience to a foreign government, China,. The Government obtained detention before the Magistrate Judge on both flight-risk and danger to the community grounds. On this Court's review of the detention order, the Government's submission listed various factors which, it argued, weighed against bail, including the seriousness of what was purportedly only the seventh economic espionage prosecution in the United States; the defendant's lack of U.S. citizenship; his lack of ties to this District, with only minimal ties to one other state in the country; his termination from employment by three American companies in five years; and his being the target of two FBI trade secret theft investigations. (Government's Response to Defendant's Motion to Revoke Detention Order, at 2-4) (Doc. #44).

This Court did not reach the danger to the community issue, but on *de novo* review, found the defendant to be a flight risk for whom no conditions would reasonably assure future appearance. The Court's analysis emphasized the factors highlighted by the Government, underscoring the seriousness of a rare economic espionage prosecution, the fact that Huang and his family were all Canadian, not U.S., citizens, and that Huang had neither family nor property in the District. (Entry on Motion for Revocation of Detention, at 3-5, Doc. #49). "Huang's lack of ties to the United States, as well as to the Southern District of Indiana, his employment history, and his ties to individuals in Europe and Asia, convince the Court that detention is appropriate." (*Id.*, at 6).

Guoqing Cao, and this case, is different in each and every material respect: stable and consistent employment; long years of residency in the United States; U.S. citizenship for him and his entire family with citizenship in no other country at the present time; home ownership, school-age children enrolled here and strong community ties all in this District; no strong connection by him to any individuals outside the United States; and significantly less severe charges, based on commercial data allegedly transferred to a commercial – not foreign governmental – entity. He should be admitted to release on bail.

C. Given the manner in which the Government has announced it intends to control the release of discovery, it will be impossible for Guoqing to assist effectively in his own defense while detained

It is often the case that pretrial detention may well "hinder [a defendant's] ability to gather evidence, contact witnesses, or otherwise prepare for his defense." *United States v. Demmler*, 523 F. Supp.2d. 677, 680 (S.D. Ohio 2007). This is especially so in this case, laden with issues of science and difficulty with Chinese speaking witnesses.

The Government has tendered to defense counsel an extremely onerous protective order, the execution of which is a *sine qua non* to the receipt of any discovery, without any regard to the technical or non-technical, secret or public, nature of the materials. As noted above, we have not even been able to listen to the tape-recorded statement made by Guoqing without agreeing to this draconian order. All discovery materials – potentially ranging from technical data held by Eli Lilly to be highly confidential to emails from our client's business email account to his wife about their evening's meal -- are to be held by counsel in locked rooms with attestations provided to the Government of any expert who might view any portion of it. This approach is grossly overbroad and heavy-handed.

Even the most basic civil protective order provides for different categories to be accorded different levels of protection, e.g., certain discovery materials are "confidential" with one level of non-disclosure, while others may be "attorneys' eyes only," with a higher level of non-disclosure attached. Also, the most rudimentary civil protective order provides a mechanism for the adverse party to challenge an overzealous designation by the producing party. The Government's demand here runs contrary to the considerations attendant to a garden variety civil case, and so is inappropriate to a highly technical criminal case with constitutional rights of fair trial and effective assistance at stake.

One aspect of the demanded protective order is particularly pertinent to this Court's bail determination. The Government would have the defense agree that Guoqing may only view discovery materials "in the presence of counsel and under the direct supervision and control of counsel."

Guoqing is, at the Government's insistence, being held in detention in the Marion County jail. The entire body of the Government's undifferentiated discovery materials would, if the Government does not relent in its demand, be held at counsel's offices in Indianapolis and Princeton, New Jersey. The Government's own strictures, then, require that Guoqing be released on bail simply to enjoy the privilege of viewing the evidence against him, a fundamental constitutional right.

IV. CONCLUSION

The Magistrate Judge failed to fully and fairly consider, either on the record or in his published order, why a combination of conditions would not "reasonably assure" Guoqing's presence at future hearings. The defendant was ready then, and remains prepared, now to surrender his passport (while is being held by his attorneys) and post his family's home as security for an appearance bond. In combination with the suggestions of Pretrial Services, that he report to pretrial services as directed and submit to home detention with GPS monitoring, this combination of rigorous conditions would provide more than reasonable assurance of future appearance and would gainsay any concerns about risk of flight.

For the foregoing reasons, Guoqing requests that the Court overrule the Magistrate Judge's Detention Order and order that Guoqing be admitted to bail and released pretrial on conditions designed to reasonably assure future appearance in court.

Dated: October 21, 2013

Respectfully submitted,

/s/ David J. Hensel

David J. Hensel, Attorney No. 15455-49
PENCE HENSEL LLC
135 N. Pennsylvania Street, Suite 1600
Indianapolis, Indiana 46204-2428
Telephone: (317) 833-1111
Fax: (317) 833-1199

Alain Leibman (*pro hac vice*)
FOX ROTHSCHILD LLP
Princeton Pike Corporate Center
977 Lenox Drive, building 3
Lawrenceville, NJ 08648-2311
Telephone: (609) 895-6743
Fax: (609) 896-1469

Attorneys for Guoqing Cao

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of October, 2013, I electronically filed the forgoing with the clerk of the court by using the CM/ECF system. Notice of this filing will be sent to the following parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

Cynthia A. Ridgeway
Assistant United States Attorney
Cynthia.ridgeway@usdoj.gov

Scott C. Newman
Attorney at Law
scott@scottnewmanlaw.com

/s/ David J. Hensel